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NO. 84-1740

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JAMES N. FLEMING,

Petitioner

v.

W. BEDFORD MOORE, III

Respondent

On Writ of Certiorari to the Supreme Court of Virginia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should certiorari be granted to a Petitioner who has deliberately distorted and fabricated a factual record on appeal that bears little relation to the true factual history of this case in violation of Supreme Court Rule 21.5?

2. Are false accusations by Petitioner of racist belief and racist behavior on the part of Respondent entitled to the protection of an absolute privilege under the First Amendment?

3. Does a private homeowner who attends a zoning hearing on a proposed housing project next to his house lose his status as a "private individual" under the First Amendment?

4. Is the evidence of Petitioner's knowledge of falsity or his reckless disregard for the truth or falsity of his statements sufficient to establish clearly and convincingly that he published with actual malice?

5. Does the Constitution guarantee that there must be blacks on a jury whenever a civil case involving this Petitioner is tried?

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No. 84-1740

IN THE UNITED STATES SUPREME COURT
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JAMES N. FLEMING,

Petitioner

v.

W. BEDFORD MOORE, III

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF VIRGINIA

The Respondent, W. Bedford Moore, III (Moore), respectfully prays that the petition for writ of certiorari of Petitioner, James N. Fleming (Fleming), be denied on the grounds that the issues raised in his petition are neither novel nor important for decision by this Court.

OPINIONS BELOW

Moore adopts Fleming's statement of the opinions below and his references to the trial transcript, trial exhibits and appendicies to the briefs filed in this Court.

STATEMENT OF JURISDICTIONAL GROUNDS

Moore adopts Fleming's statement of jurisdictional grounds for filing his petition for a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Moore adopts Fleming's statement of these provisions.

STATEMENT OF THE CASE

Moore rejects Fleming's statement of the case in its entirety. The facts set forth by Fleming are distorted, misleading and in many instances false. Fleming is attempting to fabricate a new fact history that will fit neatly into his theories on appeal. This same tactic was used by Fleming on appeal to the Supreme Court of Virginia, but the Court was not fooled, which is apparent from comparing Fleming's statement of the case in his petition to the Fleming v. Moore opinion set forth as appendix G to the petition. To correct the record, Moore submits the following statement of the case:

Moore has taught humanities at the University of Virginia since 1947 and resides in a racially integrated area of Albemarle County where he has enjoyed cordial relations with his black neighbors. His property shares a common border with a 128-acre parcel on the Rivanna Reservoir known as Evergreen, owned by Fleming and

three white partners. The reservoir is the principal water supply for more than 30,000 area residents. In October, 1974 Fleming and his white partners filed a special use permit application to build 804 housing units on the site. The land was not zoned for this size development and the housing could not be built as a matter of right (Tr. 307-08, 315, 334).

Moore knew nothing of the Evergreen plan until he was routinely notified by the county as an adjoining landowner of a site plan conference in November, 1974. At that meeting, Moore spoke with Fleming about the possibility of purchasing a small fraction of an acre of land where Moore's driveway meets the public road, a subject they had discussed several years earlier (Tr. 65). However, after reviewing plans for this massive development, Moore realized he would be opposed to it. Thinking it would be dishonorable to negotiate privately with Fleming for the property at his driveway while publicly opposing the development, Moore wrote Fleming a short, polite letter to that effect (App. A).

Pollution, not race, was the overwhelming issue in the Evergreen matter until Fleming and his attorney,

Jeroyd X. Greene, vigorously injected racism into the two hearings the County Board of Supervisors held on Evergreen I (Tr. 182-188, 279, 193-99, 290; DX 4; PX 9). Although the county planning staff recommended approval of Evergreen I, Fleming did not wait for the supervisors to meet or to express any opinions on the project before bringing race into the matter. Prior to the supervisors' first hearing he sent every member of the board a letter captioned "THE TRUE FACTS" in which he raised racial bias as an issue (DX 4). He brought Mr. Greene to that hearing and together they made racism an issue (DX 4). Serious and legitimate concerns relating to pollution of the reservoir were raised at the hearing by many persons and organizations, including the black mayor of Charlottesville, the chairman of the Rivanna Water and Sewer Authority, the executive director of the Piedmont Environmental Council, a member of the Virginia House of Delegates, the League of Women Voters, various citizens' and sportsmen's groups, professors of urban planning and engineering at the University of Virginia, a pollution control specialist for the State Water Control Board, and others, including Bedford Moore.

Moore's public opposition to Evergreen was brief and insignificant. Fleming distorts and misrepresents the record in an effort to convince this Court that Moore was a leader of opposition forces in the Evergreen matter; nothing could be farther from the truth. Moore did not organize any efforts against Evergreen. He was neither an officer nor a director of any of the numerous citizens organizations that opposed Evergreen. He gave no interviews and made no statements to the press about Evergreen. As Moore put it, "I simply opposed it on my own account" (Tr. 73-74).

The first Evergreen plan was proposed in October, 1974 and defeated by the Albemarle County Board of Supervisors in January, 1975. A second Evergreen plan — the only plan relevant to Fleming's petition to this Court — was filed in November, 1975. Fleming published his libel in January, 1976, a few days before the supervisors defeated the second plan. During that entire sixteen month period, Moore spoke no more than three times; he never spoke for more than a few minutes and there is a record of what he said on only two of those occasions. During the time when the second Evergreen plan was

considered, Moore spoke only once, and that was from his seat in the audience merely to respond to a personal attack from Fleming's attorney. He did not speak on his own initiative, nor did he speak to the merits of the second Evergreen plan.

It is important to note that Moore never "took the rostrum" except in response to personal attacks on him by Fleming or Fleming's attorney. Moore only spoke up to set the record straight after being insulted or goaded by Fleming. Fleming now portrays these brief and generally defensive remarks as being the vanguard of the opposition to Evergreen, an assertion that is as unsupported as it is preposterous.

At the January, 1975 meeting of the supervisors on the first Evergreen plan, Moore spoke for a few minutes after being personally attacked by Fleming earlier in the meeting (DX 4). Moore's remarks concerned incompatible land use and the condition of the reservoir, and took less than five minutes to deliver. The verbatim transcript of that meeting is 27 pages long; Moore's comments occupy less than a full page. Moore's comments were overshadowed (indeed dwarfed into insignificance) by the extended and detailed remarks of others who

spoke in opposition to Evergreen.

Moore's only other recorded remark at a public hearing occured twelve months later when the Albemarle County Planning Commission considered the second Evergreen plan. Fleming's attorney questioned where Moore was when another housing development near Evergreen was considered by the commission, a question which Moore perceived as a suggestion of hypocrisy on his part (DX 1). Moore's entire comment was that he was present when the other development was considered and he then asked the chairman of the commission if personal attacks were to be allowed at the meeting (DX 1). Moore did not comment on Fleming or Evergreen at that meeting. This is the only public appearance that is relevant to the petition since Fleming's libel only concerned his second Evergreen plan.

Moore did not become identified in the public eye as a leader of the opposition to Evergreen. When questioned by Fleming's counsel at trial on this subject, Moore's attorney during the Evergreen controversy stated:

> I don't think the public knew about it. Perhaps people that attended those meetings might have seen him. But his name in a public sense might have appeared in the newspaper once or twice in three years.(Tr. 289)

Not surprisingly, Fleming never bothers to advise this Court of the enormous public sentiment against Evergreen and the many individuals and organizations who, unlike Moore, did play significant roles in preventing the rezoning of the Evergreen tract (Tr. 295-98, PX 8, 9, 10, 11, 12, 13, 17, DX 1, 4, 8). Fleming's assertion that "Moore's efforts to obstruct County approval of Fleming's development were successful" is pathetic. There was no evidence that Moore's brief remark had anything to do with the supervisors' disapproval of the second Evergreen plan. However, Fleming's statement of facts might lead this Court to conclude Moore's opposition was the sole, proximate cause of the defeat of the plans. This assertion is groundless. (See App. B).

Evidence at the second trial of libel suit clearly established that Fleming used race as a weapon to intimidate and harass his opponents, including Moore. Fleming injected race as an issue in the Evergreen development as early as October, 1974 and vigorously renewed it at the supervisors' hearings on the first plan (Tr. 176, 182-88, DX 4, PX 9). His comments were so outrageous that the local newspaper published an editorial

citing the numerous dangers to the reservoir posed by Evergreen and criticizing what it viewed as an obvious attempt by Fleming and his attorneys to use race as an excuse or weapon to obtain approval for Evergreen since it might not be approved if considered solely on its merits (Tr. 45-47; See App. D).

Fleming's first plan was defeated in January, 1975. There was no "Evergreen controversy" during the period January through November, 1975. The time that elapsed between the defeat of Evergreen I and the submission of Evergreen II is important but is poorly detailed in Fleming's petition. Moore's house, Shack Mountain, was recognized by the Virginia Historic Landmarks Commission during the summer of 1975 and had been the subject of considerable scholarly comment and attention over the years (Tr. 59, PX 2, DX 2, PX 12). It was designed by Fiske Kimball and was recognized for its unique place in American architectural history (Tr. 329, 361-371). Moore neither requested nor participated in the award of the landmark designation (Tr. 363). As early as 1972, Albemarle County asked Moore if he would consider his home for inclusion in an historic zoning district (Tr.

58-63, PX 3). Shack Mountain's landmark designation did not come "during the height of controversy over Mr. Fleming's housing development" (Pet. 7) for there was no Evergreen controversy during the summer of 1975. After Evergreen I was defeated there was no indication Fleming would ever resubmit his plans (Tr. 434).

During the summer of 1975 the local governments responsible for the reservoir implemented plans to study protection and reclamation measures. As the community's chief source of drinking water, the reservoir has been a public concern of local governments since 1971 (Tr. 350-52). In June and July, 1974, before Evergreen I, the supervisors, Charlottesville city council and planning district commission received evidence regarding pollution, agreed the reservoir was in serious danger of eutrophication from runoff from housing development and other human activities in the watershed and appointed a public panel to study measures to address the problem (Tr. 298-99, 343-45, 350-52; PX 10, PX 11, PX 13). The environmental concerns regarding the reservoir were not a sham concocted to defeat Evergreen (Tr. 308-09).

In the summer of 1975 the panel recommended and the local governments retained professional consultants to study the pollution problem and propose solutions. (Tr. 301-02, 321-22), Fleming had knowledge of this action. Also, the Albemarle County soil erosion and sedimentation ordinance was amended that summer to preserve the reservoir (Tr. 343-44). Ultimately, all land in the watershed was downzoned to address pollution problems (Tr. 318-19). Moore rejects as unsupported by any evidence the characterization that his brief comment at an August, 1975 supervisors' meeting dealing with the general subject of conservation zoning was part of his crusade as a "public leader" against Evergreen (Pet. 9). His comments were not made with reference to Fleming or Evergreen (Tr. 79-80) and Fleming never testified that he relied on or even knew of Moore's August, 1975 appearance before libeling him.

In November, 1975, Fleming hastily filed his second Evergreen plan after a group of conservation-minded supervisors were elected to take office in January, 1976; protection of the reservoir had been a central issue in that campaign (Tr. 434). Environmental concerns were

again raised, this time bolstered by an exhaustive study of pollution of the reservoir (Tr. 301-02, 321-22) and an amended local soil erosion ordinance to preserve the reservoir (Tr. 343-44). Fleming's second Evergreen plan, like the first, failed to address the county's water pollution concerns (Tr. 198-99, 295-305, 342-43, 345-46, PX 9, DX 1).

Fleming published his libelous attack on Moore just prior to the supervisors' consideration of his second plan. He chose to publish it in the student newspaper of the University of Virginia where he knew Moore made his livelihood (Tr. 224-28). Fleming acknowledged he believed university students would respond to a racially-motivated appeal since, "[w]henever you talk of racism they show a certain amount of interest, the better type of students show a certain amount of interest" (Tr. 229).

Fleming's accusations of racist belief and racist activity on the part of Moore were utterly false. Moore and several witnesses proved he was not a racist. Evidence showed Moore had been raised to abhor racism and had never said or done anything that could be construed as

racist. Fleming produced no evidence at trial tending to suggest there was any truth to his defamatory charges.

Despite the falsity of his charges of racism, Fleming characterizes his charges as mere opinion and suggests that he "candidly" stated that he sincerely "believed" Moore was a racist. Fleming's testimony in this regard, as in most respects at the second libel trial, was inherently incredible. He was impeached on the stand with his own prior sworn testimony twenty-five times (Tr. 177-78, 180-81, 191-92, 193, 202-03, 203-04, 208-09, 219, 225, 225-26, 227-28, 228-29, 230-31, 232-33, 233-34, 238, 395, 398-401, 401, 402, 401-04, 404, 418, PX 14, and PX 15).

At trial Fleming attempted to prove his factual allegations of racism against Moore but failed. The record shows that prior to January 15 and 16, 1976 when the libel appeared, there was no information from which Fleming deduced Moore was a racist. His effort to create the illusion that such information existed is in two parts. The first consists of an amalgam of some conversations regarding a spot of land at Moore's driveway and the tree buffer which the county inserted as a condition

of approval for Evergreen II. The second consists of Fleming's charge that Evergreen was treated differently from developments around the reservoir proposed by whites and that public opposition to Evergreen arose due to his race, whereas white developers faced no similar opposition.

Fleming would have the Court believe that Evergreen opposition, the tree buffer, land at the driveway and Moore all became one in Fleming's eyes. But this blending of perceptions has occured on appeal; it did not occur before Fleming published his attack on Moore. Fleming is manufacturing a record to convince this Court he believed Moore was a racist before he published his libel.

In 1971, Moore and Fleming met when Fleming appraised some fire damage to Moore's trees (Tr. 67-68). They discussed the possibility of Moore purchasing a fraction of an acre where the driveway to Shack Mountain meets the public road. Moore's property comes to a point there crowding the driveway. Nothing came of this brief discussion (Tr. 65, 68). When Evergreen I was filed three years later, Moore was notified of the plan as an adjoining landowner, and again raised the possibility of this

small purchase with Fleming; however, after reviewing the plans for Evergreen I, Moore felt he could not support the project and did what he felt was the honorable thing in writing Fleming to say he felt he could not negotiate with him privately but oppose him publicly (Tr. 65-66; PX 4). Fleming never testified that he suspected any racial motivation in Moore's brief inquiries about acquiring a small piece of land at his driveway. Indeed, Fleming never testified at all about his talks with Moore regarding the driveway. Yet, now, he asserts this as a basis for his libel. He did not (and could not) "perceive" that the speck of land Moore sought to purchase at his driveway "was strikingly similar" (Pet. 10) to the 100-foot tree buffer imposed by the county on Evergreen II simply because they were not the same property. The buffer was not a spot of land at Moore's driveway; it was a one hundred foot wide, three thousand foot long strip that meandered along the steep, hilly border between Shack Mountain and Evergreen consisting of approximately eight acres (Tr. 209, 276, PX 8, PX 17).

At Petition page 10 Fleming reasserts that prior to publishing the libel he suspected some link between

the buffer and land at Moore's driveway. He cites pages 191-93 of the transcript to support his contention that he saw the buffer as the work of Moore "especially since Moore had previously negotiated with Mr. Fleming for the purchase of a buffer that was strikingly similar, at least to Fleming, as the buffer that the Planning Commission required." There is absolutely nothing whatever at pages 191-93 or elsewhere in the record that suggests Fleming connected the buffer to Moore's inquiries about his driveway before he published his libel. Indeed, his familiarity with his own project was so superficial he had a difficult time recalling whether the buffer was inserted as a condition to Evergreen I or II (Tr. 192-93).

Fleming suggests in his petition that he believed he was treated differently than white developers and Moore was not concerned with development by white people around the reservoir (Pet. 12). Even if the county government discriminated against Fleming it would not be relevant to the issue of Moore's alleged racism. However, his charges against the county are as poorly documented as those against Moore, and since he chooses

to include them in his petition they should be examined.

Fleming's allegations of discriminatory treatment are two-fold. First, he alleges the county imposed conditions on Evergreen it did not require of white developers (Pet. 12). Second, he asserts that Moore and others who oppose Evergreen did not oppose white developers near the reservoir (Pet. 12).[1]

In terms of other developments around the reservoir that Fleming used for comparison, he focused on two; Panorama and Ivy Farms (Pet. 11). However, unlike Evergreen, these projects were zoned for their proposed densities and did not require rezoning, and Fleming was aware of this (Tr. 307, 325, 334, 487-489). They only required site plan approval (Tr. 315). Further, Fleming never cited a single instance known to him before his

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[1]Fleming mentions in a footnote on page 12 that he abandoned his development plans and "dedicated" the land to a public park. He did convey his property for public use, but it is suggested he suffered some penalty in doing so. Rather, he was paid $335,000.00 for land he had acquired less than ten years earlier for approximately $35,000.00. (Tr. 394, 485-87, 499). Fleming also realized an enormous tax benefit from selling the land at fifty percent of the fair market value to the charitable institution.

libel was published in which any developer, white or black, obtained a rezoning near the reservoir such as Evergreen required. Additionally, Fleming fails to mention that the "white developments" were properly zoned from the outset.

Fleming conceded he had not attended many meetings where the county considered other developments around the reservoir, either before or contemporaneously with Evergreen, nor did he have much knowledge about the nature of any public opposition to developments proposed by whites (Tr. 195-97). Indeed, the fact that projects developed by whites were approved (regardless of their zoning) was essentially the only basis he had for concluding he was the victim of racism (Tr. 195, 197, 218-19). It is not true that Fleming knew that conditions had not been imposed on white developers. By his own admission, his familiarity with other developments was scanty at best. In fact, he never testified to any personal knowledge of conditions attached to other developments. It is not true that Fleming satisfied conditions that were imposed by the county and thereafter new ones were created such that he was being "conditioned" into oblivion (Pet.

12). The county planning staff recommended approval of Evergreen I with 10 or 15 conditions depending on the supervisors' vote, and recommended approval of Evergreen II with 16 conditions. The chief reason Fleming's plans were rejected was that he never satisfied the environmental concerns of the staff and supervisors and his engineer did not address them in the second Evergreen plan (Tr. 198-99, 295, 305, 341-43, 345).

It is literally true that Fleming "did not see Moore opposing those [white] developers" (Pet. 12), but this might lead one to conclude he knew for a fact Moore had not opposed other developers. The fact is he knew absolutely nothing about whether Moore did or did not oppose them. Before Fleming published his advertisement he had no information to suggest that Moore failed to oppose other developments around the reservoir. He was impeached with his prior sworn testimony when he stated at trial that the developer of Ivy Farms told him Moore did not oppose that development, and then admitted he had not talked to the developer (Tr. 202-03). He also conceded that he did not know whether Moore opposed Panorama because Fleming never talked to its

developer about Moore's opposition or lack of it regarding Panorama (Tr. 203-04).

Fleming repeatedly testified hypothetically regarding Moore and others who opposed Evergreen, stating they would be racists if they had not opposed white developers (Tr. 194-95), but adding he did not know that they did not oppose those developers (Tr. 195-97). Indeed, he undoubtedly knew otherwise. He was told specifically that opposition to Evergreen was not unique at the very first meeting of the board of supervisors on Evergreen I on January 22, 1975. Marsha Mashaw of the League of Women Voters responded directly to Fleming's and his attorney's charge that white developers had not faced opposition around the reservoir (DX 4):

> I would also like to add something that is not in my statement, but that is in response to something that was said earlier. That is, as you, the members of the Board of Supervisors know, the League of Women Voters has appeared before you many times either to speak for or against petitions, special permits, and zoning requests which have been before you. We have consistently opposed high density zoning around the Reservoir. We have been advocating conservation zoning for several years around the Reservoir and I might add that one of our Vice-Presidents has not been too happy about this. But this is a policy of our Board, and we have been

> before you many times. I think your record will also show that we opposed the Hollymead development mainly because it was not going to have any low cost housing in it. I think the record will also show that whenever any large developments have come before you one question that the League has consistently asked is what are going to be the provisions for low and moderate income people. So, I think it is unfair to say that the people who are before you tonight are here only for this particular instance and have never been before you at other times. Thank you. (DX 4).

At trial, Fleming repeatedly referred to the approval of Panorama by the county (Tr. 186, 194, 196-97) and asserted it was built (Tr. 194), but his own witness, supervisor Chairman Gerald Fisher, established that Panorama had not received county approval and was never built (Tr. 436-38). Fisher also established as part of Fleming's case in chief that race played no part in the county's treatment of Evergreen (Tr. 458-59).

In summary, Fleming's best hope of having his case heard on appeal is through shocking distortions of the trial record and history of the case. Fleming cannot rest his petition on the facts as they actually exist; he knows certiorari will be denied. He creates, therefore, a fairy tale consisting of half-truths, innuendo and lies,

much to the same effect of his testimony at trial wherein he was impeached twenty-five times.

ARGUMENT

In accordance with Bose Corporation v. Consumers Union, 104 S.Ct. 1949 (1984), the Virginia Supreme Court conducted an independent examination of the entire record in order to ensure that the judgment of the trial court did not consistute a forbidden intrusion on the exercise of free expression. See Petitioner's App. G-26, 35. Moore submits that upon such an examination, this Court will also conclude there has been no intrusion on the exercise of free expression by the trial court.

I. THE PETITION SHOULD BE DENIED PURSUANT TO SUPREME COURT RULE 21.5 BECAUSE PETITIONER HAS FAILED TO ACCURATELY PRESENT THE FACTS ESSENTIAL TO A READY AND ADEQUATE UNDERSTANDING OF THE POINTS REQUIRING CONSIDERATION.

As Respondent's Statement of Facts and the following argument sections make clear, Petitioner has deliberately distorted the factual record below and has fabricated certain aspects of it in an effort to have certiorari granted in this case. Such conduct should not be rewarded.

Respondent submits that such inaccuracy and

distortion of the record is sufficient reason for denying the petition, pursuant to Rule 21.5, and the Court is urged to do so.

II. FLEMING'S FACTUAL ASSERTION THAT MOORE HELD RACIST BELIEFS AND ENGAGED IN RACIALLY-DISCRIMINATORY BEHAVIOR IS NOT ENTITLED TO CONSTITUTIONAL PROTECTION

Fleming relies heavily on this Court's language in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), that there is no such thing as a false idea, to suggest that if any idea enters one's head, however far-fetched or fanciful, it is somehow entitled to constitutional protection. The extreme application of this curious theory is found in Fleming's assertion at page 42-43 that since he subjectively concluded he was the victim of racism by Moore, having no facts to support that conclusion, his factual assertion of racist belief and conduct against Moore was an "idea" or "opinion" entitled to constitutional protection.

Fleming misses the point entirely by arguing that he reached a conclusion regarding the motivation of his opponents and simply had no "serious doubts whatsoever" that this "opinion" might be factually

incorrect. Fleming is deliberately blurring the line between fact and opinion to create a false impression of what he thought and intended. At trial, and later in his appeal in the Supreme Court of Virginia, Fleming attempted to show that Moore conducted himself in a specific fashion that indicated to Fleming he was opposed to Evergreen because of Fleming's race and/or the race of those persons who might live at Evergreen. He did not state any of these facts in his libelous advertisement, but clearly implied his accusations were based on certain undisclosed facts known to him.

Fleming captioned his libelous advertisement "RACISM" and Moore is the only living person named in the body of the advertisement. Among other things he charged:

> ...We have a replica of Monticello upon the hill overlooking my property which is occupied by a man who wants to deprive working people of the same opportunities that Mr. Jefferson sought for them. Mr. Jefferson even located his slaves' quarters down the hill from his house, but Bedford Moore, the occupant of Little Monticello does not want any black people within his sight.

This false and defamatory attack on Moore is part of

a lengthy diatribe in which Fleming endeavors to create the impression that he is privy to specific facts arising out of the Evergreen controversy that support his accusations of racist belief and conduct on the part of Moore. Not only are the facts alleged about Moore untrue, there are simply no facts to support Fleming's conclusion that Moore was guilty of racially-motivated conduct. Under any standard enunciated since Gertz for delineating constitutionally-protected opinion, this diatribe is not protected "opinion" under the First Amendment.

Fleming's reliance upon Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc), cert denied, (May 28, 1985), to support his contention that his libel was merely opinion is persuasive only so far as one accepts Fleming's factual fabrications and his extreme simplification of the Ollman holding. For example, Fleming states the Ollman court held that an "accusation of 'Marxism'" was constitutionally protected opinion (Pet. 23). Fleming broadly analogies the "Marxism" accusation and its underlying facts to the "racism" charge and the facts of this case (Pet. 24). The analogy is absurd. Fleming and his counsel must be aware that the allegedly

defamatory language in Ollman was not an "accusation of 'Marxism'" but a series of statements relating to Ollman's activities as a political activist and college professor. In fact, Ollman is a self-professed Marxist incapable of being defamed by an allegation of Marxism. 750 F.2d at 987, opinion page 35. "Much like the term 'Marxist' that was examined in Ollman," Fleming continues, "the term 'racism' is commonly understood to be a term that is 'hopelessly imprecise and indefinite.'" (Pet. 24). But the term "Marxist" was not examined in Ollman. Rather, the court examined, inter alia, the sentence "[Ollman] is an outspoken proponent of political Marxism," 750 F.2d at 987, opinion page 35, which it found to be a "loosely definable, variously interpretable statement of opinion." Id. The court speculated that "the trier of fact in assessing the statement would have the dubious task of trying to distinguish 'political Marxism' from 'nonpolitical Marxism,' whatever that may be." Id. Compare that allegedly defamatory statement with Fleming's factual assertion that "Bedford Moore, the occupant of Little Monticello, does not want any black people within his sight." Petitioner's App. O-2.

The Ollman court also examined the statement "[Mr. Ollman] is widely viewed in his profession as a political activist," which was found to be too "hopelessly imprecise and indefinite" to amount to a statement of fact. 750 F.2d at 987, opinion page 36. Fleming relies on this finding to support his new contention that an allegation of racism against Moore is also "hopelessly imprecise and indefinite." (Pet. 24, 25). But at trial, Fleming had no difficulty with precision of definition:

> Q All right, sir. The caption of your ad is "Racism", is it not?
>
> A Correct.
>
> Q And you didn't just pick that out of the air, you got that from Webster's Dictionary, didn't you?
>
> A Correct.
>
> Q In fact you got it from Webster's Third International Dictionary, did you not?
>
> A Correct.
>
> Q And when you used the word racism you had something in mind, you had a dictionary definition, did you not?
>
> A Racism in my...in my definition after reading it in the dictionary, to me I came to the conclusion condition. I had read many articles before labeled racism.

Q All right, sir. Would you read the definition of racism in Webster's Third International Dictionary and it's a little further down the page, there you go.

A It says the assumption that, I tell you it's hard for me to read this fine print, cultural trait and capacities are determined by biological race and that race difference, decision, decisionally race different decision from one another which is usually coupled with a belief in the inherent superiorities of the particular race and its right to dominate over others.

Q All right, sir. Is that the complete definition there?

A I don't...

Q All right and it goes on, a doctrine or political program based on the assumption of racism and designed to execute its principles, a political or social system founded on racism, correct?

A Racism, yes, correct.

Q What's the definition of racist in this dictionary?

A It's one who advocates or believes in racism.

Q All right, is that Bedford Moore?

A If he interpreted it that a way, yes.

Q And on what facts did you base your conclusion that Mr. Moore was an adherent of racism on your dictionary definition, the one you testified to that you used and relied on in this ad?

A From the action of all the activity going on that time in reference to land being developed around the reservoir.

Q All right, sir. The facts you've already testified to?

A Yeah.

Q And based on those facts, Mr. Moore fit the dictionary definition of racism, one who adheres to racism?

A Yesterday and today as far as I'm concerned.

Q All right, sir. And a racist according to your dictionary is a believer in racism, isn't that right?

A Right, correct.

Q All right, sir. And it's also true that the only living person named in your ad is Bedford Moore?

A True.

(Tr. 236-238). Even after giving this detailed definition, Fleming could not cite even one fact regarding Moore's beliefs or actions which met any of the definitional standards of the dictionary. Having painted himself into a corner with his dictionary definition, Fleming expects this Court to ignore his testimony and find his libel to be "hopelessly imprecise."

Applying the Ollman four-part test to the defamation and underlying facts in this case clearly demonstrates that the defamation is not a mere statement of opinion. The libel was precise in its terms and common usage; it was capable of being verified or proved false (which was shown conclusively at trial); it was surrounded with language that would influence the average reader's readiness to infer factual content and support, such as references to tenure, living off the public dole, the replica of Monticello, wanting to deprive working people of opportunities and pollution of the reservoir; and, finally, the setting in which the statements appeared, as was shown at trial, was designed by Fleming to inflict the most serious damage to Moore.

Fleming draws a weak analogy to Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970), and attempts to equate Fleming's malicious defamation against a private citizen with the clear, rhetorical hyperbole quoted in the "Greenbelt News Review." This Court stated the obvious in saying, "No reader could have thought that either speaker...or the newspaper...were charging Bresler with the commission of a criminal

offense." 398 U.S. at 14. Yet, as two trial juries and the Supreme Court of Virginia have found, Fleming's libel could be and was understood to be an accusation of racist beliefs against Moore which held him up to public contempt, scorn and ridicule and injured his reputation.

Fleming draws an equally weak analogy to Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977), where a noted syndicated columnist was labeled a fascist and a fellow traveler of fascism by Littell. Here again, Fleming persists in his attempt to focus attention solely upon the caption of his libel and not the content. Littell, unlike Fleming, did not set forth false and defamatory facts in support of his characterization of Buckley.

Interestingly, Fleming does not cite that portion of the Buckley opinion which found certain of Littell's statements to be defamatory statements of fact. The appeals court affirmed the finding of libel with regard to the following statements in Littell's book:

> Like Westbrook Pegler, who lied day after day in his column about Quentin Reynolds and goaded him into a lawsuit, Buckley could

> be taken to Court by any one of several people who had enough money to hire competent legal counsel and nothing else to do.

539 F.2d at 895. The court concluded this was a factual assertion relating to Buckley's integrity as a journalist and since Buckley proved the statement was false at trial, the court concluded it was constitutionally, as well as tortiously, defamatory. Id. at 896.

Like this last actionable defamation by Littell, Fleming's charge that Moore specifically did not want blacks living within his sight and specifically intended to deprive them of opportunities rightfully theirs, are false and defamatory statements of fact. Fleming devotes less than a full page of argument to the specific charges contained in the body of the advertisement (Pet. 30-31) and nowhere does he address the specific false and defamatory statements that were the subject of this suit: the charges of Moore not wanting blacks living within his sight and wanting to deprive them of opportunities sought for them by Thomas Jefferson.

Moore submits it is no accident that Fleming devotes only one of fourteen pages of argument to the real issue at hand. Fleming never produced any evidence, direct

or circumstantial, that tended to show in any respect that Moore harbored racial bias or ill-will toward Fleming or any person, that he did not want blacks living near him or that he wanted to deprive them of rights, privileges and opportunities as citizens or working people.

More importantly, these false and defamatory allegations were factual allegations or, at best, opinions based on false and defamatory facts that clearly are not covered by the umbrella of absolute constitutional privilege under any known theory of law. See Hotchner v. Castillo-Puche, 551 F.2d 910 (2d Cir. 1977) cert. denied sub nom Hotchner v. Doubleday & Co., 434 U.S. 834 (1977).

III. MOORE WAS A PRIVATE INDIVIDUAL THROUGHOUT THE EVERGREEN CONTROVERSY AND DID NOT LOSE THE FIRST AMENDMENT PROTECTIONS ACCORDED PERSONS IN THAT STATUS

Fleming carries the "public figure-private individual" inquiry past any logical extreme. In essence, his position is that any person who speaks out in the context of a matter of public concern — even if only once — becomes a public figure. Fleming knows only too well that Moore was not a leader of the opposition to Evergreen II and

Moore's opposition arose largely from his concern for his own private residence. Indeed, Fleming testified that the chief reason he libeled Moore was because the Albemarle County Planning Commission staff insisted that Fleming leave a buffer of existing trees between Evergreen and Moore's residence, a condition that would only benefit Moore personally and was not a matter of public concern (Tr. 192). Further, not only was this buffer a major motivating factor in the defamation, the evidence established beyond any doubt that Moore did not suggest, design, or advocate the buffer (Tr. 82). Thus, the so-called "public controversy" related chiefly to a matter that was of little or no concern to anyone other than the two parties to this action.

It is also important to note that Moore never thrust himself to the forefront of the Evergreen controversy. He was dragged into it quite unwillingly by Fleming as a result of Fleming's proposed plans and personal attacks by Fleming and his attorney. Moore was simply a private homeowner whose personal residence happened to adjoin an enormous housing project planned by a group of local developers, black and white. As such, his attendance

at a public meeting, pursuant official notification to him by the county, was not unlike the resort to the processes of the courts by Mrs. Firestone in Time, Inc. v. Firestone, 424 U.S. 448 (1976). The majority in that case noted there is a certain amount of unavoidable public exposure involved when one resorts to the judicial process to exercise legal rights. 424 U.S. at 454. Moore had a legitimate interest in the Evergreen matter and had no choice but to attend the administrative meeting in order to protect his limited private interest.

The specious and preposterous nature of Fleming's public figure argument is accentuated by his repeated and unwarranted resort to ad hominem attacks upon Moore. For example, he describes Moore's involvement in the public debate as "vigorous" (Pet. 34), opposing Evergreen "with every means at his disposal" (Pet. 36) and argues Moore gave "strident voice to his opposition to the Evergreen development" (Id.) "shadow[ing] Fleming at every turn" (Id.). There is nothing in the record to support these ridiculous characterizations of Moore; indeed, Moore is a very private academician whose comments at trial and during the Evergreen matter were

self-effacing and understated. No better proof of his low-key approach to the whole matter exists than his brief, polite letter to Fleming declining to negotiate with him privately regarding land at his driveway (App. A). Perhaps Fleming feels he must "gild the lily" to make Moore look like a public figure as defined in Harris v. Tomczak, 94 F.R.D. 687, 704 (E.D. Cal. 1982). Moore is not such a public figure, nor was the famous and very public Dr. Harris in that case.

Moore's participation in the Evergreen matter is not unlike that of the plaintiff in Gertz v. Robert Welch, Inc., supra. In concluding it was plain that Gertz was not a public figure, this Court noted:

> He played a minimal role at the coroner's inquest, and his participation related solely to his representation of a private client. He took no part in the criminal prosecution of Officer Nuccio. Moreover, he never discussed either the criminal or civil litigation with the press and was never quoted as having done so. He plainly did not thrust himself into the vortex of this public issue nor did he engage the public attention in an attempt to influence its outcome. 418 U.S. at 352.

There is no evidence that Moore ever became the object of any discernable degree of public attention or comment. See Hutchinson v. Proxmire, 443 U.S. 111, 135 (1979).

Similarly, in Wolston v. Reader's Digest Association, Inc., 443 U.S. 157, 167-168 (1979) this Court held "a private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention," emphasizing the importance of focusing on the "nature and effect of an individual's participation in the particular controversy giving rise to the defamation." It is inconceivable that a private individual who speaks out for a matter of seconds on one occasion at a hearing concerning Evergreen II in response to a personal attack from Fleming's attorney would become a public figure. Indeed, the gravamen of Fleming's argument is not only that any person who speaks out on any subject related to a public controversy is a public figure, but that any libel defendant who singles out a private individual as the target of his libel during a public controversy also becomes a public figure, however involuntarily and unwillingly. This theory was specifically rejected by this Court in Hutchinson, 443 U.S. at 135.

In any event, even if the trial court erred in holding Moore to be a private figure it would be harmless error since Moore proved actual malice clearly and convincingly

for recovery of punitive damages. Having proved actual malice, the outcome remains the same.

IV. THERE WAS SUFFICIENT EVIDENCE OF ACTUAL MALICE TO SUPPORT THE PUNITIVE DAMAGE AWARD

The jury was instructed that an award of punitive damages required a finding of New York Times malice. "Clear and convincing evidence" was correctly and without objection defined as "evidence that creates in your minds a firm belief or conviction that [a party] has proved the issue." (Tr. 574). Viewing the evidence objectively, there can be no question but that the jury had before it sufficient evidence to find liability under the New York Times standard.

Fleming's case on appeal regarding New York Times malice consists of little more than his subjective state of mind as he chooses to tell it and he asks this Court to take his word for what he claims he believed and draw all inferences from the evidence that favor his theory of the case. While a defendant's state of mind may be relevant, there is no authority that requires the trier of fact or an appellate court to accept the defendant's word for his state of mind, his good faith or lack of malice.

One court analyzed this aspect of defamation cases quite persuasively:

> It is urged that it must be proved that the libelous publication was made with actual malice or with reckless disregard of the truth. New York Times Co. v. Sullivan; Curtis Pub. Co. v. Butts. But such proof is supplied when a totality of the circumstances suggests malice, and even though the publisher may testify that he acted in good faith (or without malice) "the facts, all the facts, are to be considered in arriving at the truth of his real motive." It is never expected that the publisher will admit his own malice. Likewise, it would impose too onerous a burden on plaintiff to expect him to bring forth a witness to testify that he overhead the publisher say that he was actuated by malice. The circumstances, all of the circumstances, must be considered, and from those circumstances, despite the publisher's sworn testimony to the contrary, a jury may properly conclude the publisher was motivated by malice.

Montgomery v. Pacific & Southern Company, Inc., 131 Ga. App. 712, 206 S.E.2d 631, 635 (1974), aff'd, 233 Ga. 175, 210 S.E.2d 714 (1974). (Emphasis original, citations omitted).

In analyzing the evidence relating to malice this Court should consider the substantial public record of what Fleming and his attorneys said, did and participated in relative to Evergreen between 1974 and 1976 which

rebuts his claims of racism and unequal treatment. Fleming never produced a scintilla of evidence of racist behavior, belief or motive on Moore's part while Moore produced overwhelming evidence to the contrary. Fleming charged that pollution of the reservoir was a "sham" to stop Evergreen, yet the unrebutted and overwhelming public evidence in 1974, 1975 and 1976 was that the reservoir was in serious peril, Evergreen would make the situation worse and neither Fleming nor his engineer offered plans to address the problem. Fleming never produced evidence tending to rebut or question the evidence relating to pollution of the reservoir, but merely stated his conclusion that it was a sham. Finally, the Court should carefully review what Fleming cites as the evidence which negates malice. It lacks both probity and force. Most of it is mere conclusion, not fact or based on fact.

For example, at page 42, he states no factual basis for his "belief" that Moore was a racist but merely a conclusion that "he did not oppose the white development on the reservoir and only opposed mine as being black." (Quoting Tr. 218-219). This self-serving remark is

revealing, however, because Fleming fails to quote the question and answer that follow this asserted belief that Mocre had not opposed other developments:

> Q. All right. And that would be Ivy Farms and Panorama?
>
> A. That's right.

(Tr. 219). This answer is instructive because Fleming testified earlier at trial that he knew nothing at all about Moore's involvement in other development controversies around the reservoir, particularly Ivy Farms and Panorama. He stated neither he nor his attorneys ever talked with Moore about his concerns relating to development around the reservoir before the advertisement was published (Tr. 201-202). He claimed the developer of Ivy Farms told him Moore had not opposed Ivy Farms, but was immediately impeached with his prior sworn testimony that that developer "hasn't ever talked to me about it" (Tr. 202-03) and then admitted he had not talked to that developer about Moore before the libel (Tr. 203). His testimony was equally unpersuasive regarding his awareness of Moore's role, if any, in the Panorama development. When asked directly whether the developer of Panorama

had ever advised him about Moore's opposition to Panorama, Fleming at first hedged and indicated that "maybe during the years of this, all this controversy I asked, I said something to Wendell, Mr. Wood" (Tr. 203), but was immediately impeached with his prior sworn testimony, which he promptly adopted as his testimony at trial:

> Q. All right. Read line 19, the question and the answer if you would please?
>
> A. I rely on this. I rely on my answer today. It is the same answer I said then.
>
> Q. All right. Q: Have you ever talked to Wendell Wood about whether Mr. Moore had ever opposed his development? A: No. I didn't ask him specific questions about it. I didn't ask him specific questions but I know he didn't. I know he didn't get opposed. He didn't get opposed like I did because he is white. (Tr. 204).

Yet, Fleming was present at the December 2, 1975 Planning Commission hearing on Evergreen II when Moore indicated he was present at the hearing on Panorama. The jury was justified in concluding Fleming's testimony was a fabrication designed to create the appearance of having a good faith belief. One cannot profess to having a subjective belief based on observed or understood

facts when one admits the "facts" are fabrications.

At page 42, Fleming excerpts his testimony at page 490 of the transcript regarding his alleged frustration with the conditions imposed on Evergreen while other developers were obtaining approval of their plans. This testimony has nothing to do with Moore or anything that may have led Fleming to think Moore was a racist. Aside from that, Fleming, a real estate expert, knew perfectly well that other projects on the reservoir were zoned for high density development (Tr. 487-489), which his was not.[2] Yet, as always, he "perceived" every outcome in racial terms (Tr. 490).

Fleming repeatedly urges this Court to look at the evidence "through his eyes" and feels it is enough to say he had no doubts about Moore's racism. But there

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[2] On page 45, Fleming states, "Two developments along the reservoir were approved just as Fleming introduced Evergreen II." The statement, which is not cited to the record, is false. A footnote on the same page quotes James B. Dick, the county zoning administrator who took office six months after Evergreen II was defeated. Fleming's petition does not reveal that Mr. Dick's second answer in that footnote was objected to and the court instructed the witness to answer the question that was asked. Fleming also does not tell this Court that Mr. Dick was Fleming's attorney after resigning as zoning administrator and prior to testifying at trial.

was ample evidence from which the jury could infer that any reasonable individual, and Fleming in particular, could not have published such a broadside against Moore without entertaining some question regarding its truth. The specious nature of Fleming's "beliefs" regarding Moore's alleged "use" of the tree buffer and reservoir pollution are amply detailed in Moore's Statement of Facts as are the "similarities" between the buffer and the driveway entrance. This and Fleming's "knowledge" that Moore did not oppose Ivy Farms and Panorama is the total of evidence relied upon to prove he believed that Moore was a racist. It is a sham and the jury was justified in so finding.

> Although a publisher does not have an absolute duty to investigate, a publisher cannot feign ignorance or profess good faith when there are clear indications present which bring into question the truth or falsity of defamatory statements.

Gertz v. Robert Welch, Inc., 680 F.2d 527, 538 (7th Cir. 1982)(citations omitted), cert. denied, 459 U.S. 1226 (1983).

Fleming's conduct after publishing his libel also illustrated to the jury his malicious efforts to silence

his opponents. In December, 1976, Fleming filed plans with the county for Evergreen III. When he filed that plan he also filed a civil rights conspiracy suit in federal court against Moore, several other individuals and "John Doe" (Tr. 241). He admitted "John Doe" was made a defendant so that people would be afraid to publicly oppose Evergreen III (Tr. 241). At trial, Fleming conceded that the racism he ascribed to Moore in the 1976 civil rights suit was the same racism he ascribed to Moore in his defamatory advertisement (Tr. 242). The federal court dismissed the suit on a motion for summary judgment filed by Moore, and Fleming subsequently withdrew his appeal of the district court's judgment in the Fourth Circuit (Tr. 242-46). Fleming had no more evidence of Moore's alleged racism when he filed the civil rights suit than he did before he published his advertisement. The filing of that specious action, timed as it was with the filing of Evergreen III, clearly established Fleming's pattern of maliciously intimidating his opponents just as he had when he timed his libel to coincide with consideration of Evergreen II.

Even in the context of media defamation, it has

been held that failure to seek corroboration from the most obvious source is circumstantial evidence relating to reckless disregard for the truth. Alioto v. Cowles Communication, Inc., 430 F.Supp. 1363, 1371 (N.D.Cal. 1977) aff'd 623 F.2d 616 (9th Cir. 1980), cert. denied 449 U.S. 1102 (1981). Fleming fabricated an inquiry to Ivy Farms' developer and never consulted Panorama's developer. He had no information regarding Moore's views on race or other developers. Further, it has been held that a publisher's ill-will toward plaintiff and lack of substantial independent support for his charge is relevant evidence in determining recklessness under the New York Times standard. Stevens v. Sun Pub. Co., 270 S.C. 65, 240 S.E.2d 812, 815, cert. denied, 436 U.S. 945 (1978). See also Curtis Pub. Co. v. Butts, 388 U.S. 130, 157 (1967). The timing of Fleming's advertisement and its place of publication give rise to a reasonable inference that his purpose was not, as he contended, to inform the misguided readers of the Daily Progress, but to intimidate Moore into silence and to embarass Moore to his students and colleagues just prior to the county supervisors' consideration of Evergreen II in

January, 1976.

Fleming concludes his effort by asking this Court to allow him "to rely on circumstantial evidence indicating that his opposition might be racially motivated" (Pet. 46). This "circumstantial evidence" has been largely fabricated or misstated in his petition. Indeed, the direct and circumstantial evidence in the record shows that no one participating in the Evergreen controversy, most of all Fleming, could have reasonably concluded that Moore was a racist who opposed Evergreen on racial grounds. In viewing the evidence as a whole, the jury was justified in concluding that Fleming either knew what he was saying about Moore was false, or uttered his defamation without regard for the truth or falsity of what he was saying. Fleming's protestations that he entertained no doubts about Moore's racist motivations finds no support in the record. Indeed, the Virginia Supreme Court noted that "there was substantial, credible evidence to support the jury's finding that Fleming acted with recklessness that was tantamount to a willful disregard for the truth . . . abandon[ing] all judgment and reason in composing and publishing the advertisement."

Petitioner's App. G-42,43.

Fleming relies upon St. Amant v. Thompson, 390 U.S. 727 (1968) for the proposition that Fleming must have entertained doubt about the truth of his charges against Moore (Pet. 40-41) and it is true that Justice White stated that "failure to investigate does not in itself establish bad faith." St. Amant, 390 U.S. at 733. However, he did go on to note that the

> defendant in a defamation action brought by a public official . . . cannot automatically ensure a favorable verdict that he testified with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly upon an unverified, anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

Id. at 732 (emphasis supplied, footnotes omitted). In reviewing the quoted language it is apparent that the jury would be justified in finding that Fleming's accusations of racism were "the product of his imagination" and

that his charges were "fabricated" much as many of his references to the record in his petition are fabricated.

Fleming's reliance on Time, Inc. v. Pape, 401 U.S. 279 (1971) is misplaced. It is true one can adopt a rational, though incorrect, interpretation of another's ambiguous conduct based on circumstantial evidence, but one must nevertheless point to some evidence that objective individuals would view as supportive of that erroneous interpretation. Pape involved a careful, thorough investigation by professional journalists who were accused of malice because the word "alleged" was left out of their report of an official summary of police activity. Id. at 282-83. Unlike Fleming, these journalists did not fabricate grounds for their report or concoct a subjective basis for their beliefs after they were sued. Pape is plainly a case where the Court was solicitous of media reports on the conduct of public officials. Id. at 290-91.

Fleming has failed to support his view of the case with evidence in the record. His advertisement was not a rational interpretation of ambiguous conduct but a malicious effort on his part to silence, through

intimidation, a well-meaning opponent of Fleming's business interests and those of his white partners. Fleming's false allegations of racism against Moore were known by him to be false and were published with a reckless disregard for the truth, and there was ample evidence to support the jury's finding.

V. THE ABSENCE OF BLACKS ON THE JURY DID NOT VIOLATE FLEMING'S CONSTITUTIONAL RIGHT TO DUE PROCESS

On page 49 of his petition, Fleming incorrectly quotes the Virginia Supreme Court as finding the compensatory award not to be the product of a fair and impartial decision. Fleming states: "The compensatory award was described by the Supreme Court of Virginia as 'so out of proportion to the damages sustained to suggest that it is not the product of a fair and impartial decision' (App. G at G-40)." This misquotation is but another distortion of the record below by Fleming. First, the quotation appears not on page G-40 but on page G-39. Second, the quotation is not in reference to the case appealed from but rather is cited by the court as precedent for reviewing a compensatory award, per Smithey v. Refining Co., 203 Va. 142, 122 S.E.2d 872 (1961).

The allegation by Fleming that a black man cannot receive due process in a civil case from an all white jury is in itself an indication of racism. Fleming has apparently concluded that all white people are inherently incapable of fairly judging the acts of black people. Such a theory is undeserving of this Court's consideration.

Although Fleming disclaims urging a "sweeping new principle of constitutional law that all juries must contain quotas of various population groups" (Pet. 47), that is exactly the remedy he wants this Court to adopt. Without some sweeping new principle of constitutional law this Court is powerless to affect the method of jury selection in Albemarle County, which in all respects conforms to the existing state and federal constitutional provisions.

Without reference to the record, Fleming makes the unsupported charge that Moore's counsel deliberately struck all black jurors from the panel. There is no evidence in the record that plaintiff deliberately used two of his three peremptive strikes to procure an all white jury (Tr. 11-23, See App. C). This is merely an assumption on Fleming's part, which is not surprising since he views

this matter as a "race case" (Pet. 50) rather than an action based on defamation.

In fact, as is abundently clear from the transcript of the voir dire (App. C), the question of racial bias or prejudice was explored at length by Fleming's counsel. There is no evidence in the record that any racial bias or prejudice was detected by Fleming's counsel, who used his three peremptive strikes in the same manner as Moore's counsel.

The law on this issue has been clear since this Court decided Swain v. Alabama, 380 U.S. 202 (1965). The Swain Court held that "a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tried him." 380 U.S. at 208; see also 47 Am.Jur. 2d Jury §§164, 167 (1969). Swain also focused on the petitioner's challenge to the state prosecutor's use of peremptory strikes to exclude all the blacks who were summoned for jury duty. The Supreme Court rejected his challenge, observing that "we cannot hold this striking of Negroes in a particular case is a denial of equal protection of the law." 380 U.S. at 221.

The rationale underlining Swain is both obvious and sound. Confronted with the responsibility for examining the demographic characteristics of the parties to a judicial proceeding, the court would be required to "hand-pick" specific jurors to serve on the panel. The concept of random selection and impartiality will disappear from the jury selection process on the theory that only a member of a particular class can pass judgment on another member of the same class.

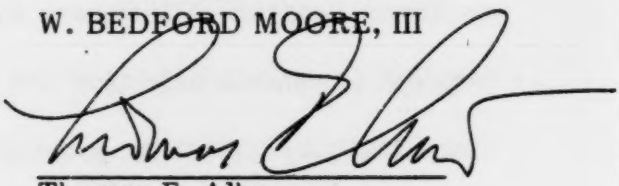
Fleming apparently recognizes the blatant undesirability of such a modification because he acknowledges that a black need not be tried by a jury with one or more blacks in every instance (Pet. 47). But he offers no suggestions as to which cases would require blacks or how to select juries from panels in a way that would guarantee black jurors short of a sweeping new interpretation of the constitution. Clearly, any change in existing law would mean certain people summoned for jury duty would in effect be beyond the reach of a peremptory strike. Surely this would be medicine far more dangerous than the alleged illness.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be denied.

Respectfully submitted,

W. BEDFORD MOORE, III



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CERTIFICATE OF SERVICE

I hereby certify that on the 31 day of May, 1985 I served counsel for petitioner with three (3) copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari by mailing the same, first class postage prepaid to counsel for Respondent at the following address:

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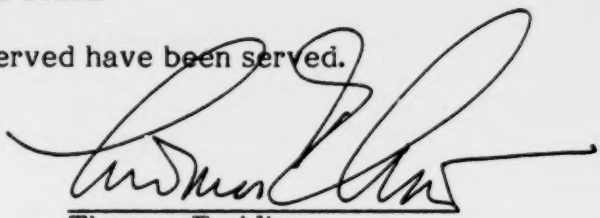
All parties to be served have been served.



Thomas E. Albro

APPENDIX A

CIRCUIT COURT OF ALBEMARLE COUNTY, VIRGINIA

W. BEDFORD MOORE, III

Plaintiff

v.

JAMES N. FLEMING

Defendant

Law No. 976-L

October 21-22, 1982

Plaintiff's Exhibit 4

27 November 1974

Mr. James N. Fleming
Ideal Realty Company
304-A Ridge Street
Charlottesville, Virginia 22901

Dear Mr. Fleming:

I write to you as a courtesy to say that I have not followed up that proposed meeting with you and your partners because I have realized upon looking further into the matter, that I could not negotiate with you gentlemen in good faith and then turn around and oppose your project in the public hearings—as I feel I must do for the good of my neighbors and the county as a whole.

Let me assure you that there is absolutely nothing personal in my opposing you on this matter.

Sincerely yours,

Bedford Moore

BM:pa

APPENDIX B

CIRCUIT COURT OF ALBEMARLE COUNTY, VIRGINIA

W. BEDFORD MOORE, III

Plaintiff

v.

JAMES N. FLEMING

Defendant

Law No. 976-L

October 21-22, 1982

Minutes of Albemarle County
Planning Commission
of December 2, 1975

Defendant's Exhibit 1

December 2, 1975

The Albemarle County Planning Commission held a regular meeting on Tuesday, December 2, 1975, 7:30 p.m., County Office Building, Charlottesville, Virginia.

. . .

SP-537. James N. Fleming, Flamenco Enterprises, Inc., and Four Seasons West Limited Partnership have petitioned the Albemarle County Board of Supervisors to locate a Planned Community on 128.06 acres zoned A-1 Agricultural. Property is situated on the west side of Route 743 (Hydraulic Road). County Tax Map 44, Parcel 35B, and County Tax Map 45, Parcels 8, 8A, 12, 13, and 14, 17, 18, 19, or parts thereof. Jack Jouett Magisterial District.

. . .

Mr. Carr stated that he felt the following were reasons for deferring action.

1. Preliminary Plan is insufficient - general master plan should be redesigned;
2. Commercial area as far as size and location should be spelled out;
3. Input from Education Department is necessary;
4. More knowledge is needed on the common area with reference to Homeowners' Agreement;
5. More information regarding the pond and its dam are needed;
6. More engineering information is needed (regarding sediment basin plans);
7. Lot layout so as not to encroach on slopes of more than 25% is needed;
8. Staff review of Virginia Department of Highways and Transportion input is needed;
9. Complete review by the Engineering Department regarding storm water and utilities;
10. Evidence that the applicant has considered the interim ordinance regarding the protection of the Rivanna Reservoir.

Mr. Barksdale said that a definite date for another public hearing should be given to the applicant.

Mr. Puryear again asked for the courtesy of action, even if denial, in order that the request can move on to the Board of Supervisors.

Mr. Gloeckner called for the question.

The vote for the motion to defer carried by a vote of 7-1, with Mr. Easter voting against the motion.

APPENDIX C

CIRCUIT COURT OF ALBEMARLE COUNTY, VIRGINIA

W. BEDFORD MOORE, III

Plaintiff

v.

JAMES N. FLEMING

Defendant

Law No. 976-L

October 21-22, 1982

Transcript Pages 11-23

THE COURT: Ladies and gentlemen of the jury panel, are you all over the age of 18, citizens of the Commonwealth of Virginia, for at least six months? If any of you all are not, please raise your right hand.

(All jurors indicated in the affirmative.)

THE COURT: Apparently all are so qualified. The case that we have for your consideration today is the case of W. Bedford Moore, III, plaintiff, v. James N. Fleming, defendant. The allegation of the case is that in January of 1976, in this county, Mr. Fleming published a libel in two newspapers against Mr. Moore, I ask you now, if any of you are related by blood or marriage to Mr. W. Bedford Moore, III, or Mr. James N. Fleming? If any of you are, please raise your right hand.

(All jurors indicated in the negative.)

THE COURT: Apparently none are so affected. I ask you now if any of you or any of your immediate family have any relationship, business, social, professional or otherwise with either the plaintiff, Mr. Moore, or the defendant, Mr. Fleming or any members of their immediate families? If any of you have such relationship, of any kind, please raise your right hand?

MR. GREENWOOD: I'm a real estate broker and I've done business with Mr. Fleming.

THE COURT: Do you feel that your business relationship with Mr. Fleming in the past would make it difficult for you to render a fair and impartial verdict in this case?

MR. GREENWOOD: No.

THE COURT: All right, sir. Your name, sir?

MR. CAREY: Thomas Carey.

THE COURT: Mr. Carey, what is your relationship and with whom?

MR. CAREY: Well, I am a friend of Mr. Fleming's wife that I think...the wife that he divorced I think.

THE COURT: Well, do you feel that your friendship with Mr. Fleming's former wife would in any way affect your ability to render a fair and impartial verdict in this case?

MR. CAREY: I believe it would, Your Honor.

THE COURT: All right, I will ask that you step down and take your seat in the audience. Call the next juror.

(Mr. James Howe was brought into the courtroom at this time.)

THE COURT: All right, sir, before you are seated if you will raise your right hand and be sworn on the voir dire.

(Mr. Howe was sworn at this time on the voir dire.)

THE COURT: What is your name, sir?

MR. HOWE: James Howe.

THE COURT: Mr. Howe, I ask you now if you are over the age of 18, a citizen of the Commonwealth of Virginia for at least one year and of the County of Albemarle for at least six months?

MR. HOWE: Yes, sir.

THE COURT: The case that we are trying this morning involves Mr. Bedford Moore, III, as plaintiff and Mr. James N. Fleming, defendant. The charge is that Mr. Fleming published a libel against Mr. Moore in January of 1976 in this county. I ask you now if you are related by blood or marriage to either Mr. Moore or Mr. Fleming?

MR. HOWE: No, sir.

THE COURT: Do you have any business, social, professional or other relationship with either of these gentlemen or does any member of your immediate family have such a relationship?

MR. HOWE: No, sir.

THE COURT: All right, you may have your seat. Have any other members of the jury, upon consideration determined that they have any of the relationships that the court has previously inquired about?

(All jurors indicated in the negative.)

THE COURT: Apparently not. I ask you now if any of you have acquired any information about this alleged libel from the news media or any other source? If any of you have acquired any such information, please raise your right hand?

(All jurors indicated in the negative.)

THE COURT: Are any of you sensible of any bias or prejudice against either party to this suit? If any of you are please raise your right hand.

(All jurors indicated in the negative.)

THE COURT: Apparently none. Do any of you have any interest in the outcome of this case other than your interest as good citizens? If any of you do, please raise your right hand.

(All jurors indicated in the negative.)

THE COURT: Apparently not. Are any of you presently represented by either Mr. Poindexter or Mr. Carter who are representing Mr. Fleming or by Mr. Albro or Mr. Pope, representing Mr. Moore?

(All jurors indicated in the negative.)

THE COURT: Have any of you been...are you now represented by any of these gentlemen or have you been represented by them within the last two years? If any of you have, please raise your right hand.

(All jurors indicated in the negative.)

THE COURT: Do any of you know of any reason whatever why you should not render a fair and impartial trial to the parties in this suit according to the law and the evidence? If any of you do...

MRS. HIRSCH: Excuse me, Your Honor, are you Mr. Bruce Carter?

THE COURT: No, this is Mr. Carter over here. Do any of you know of any reasons whatsoever why you should not render a fair and impartial verdict to both parties in this suit?

(All jurors indicated in the negative.)

THE COURT: Any questions of counsel for the plaintiff?

MR. ALBRO: No questions, Your Honor.

THE COURT: Any questions of counsel for the defendant?

MR. CARTER: Have any of you read or heard anything about this case in the local...

THE COURT: The question has already been asked and answered of the jury, Mr. Carter. I am willing for you to voir dire the jury but you must not repeat the questions that have been asked.

MR. CARTER: Have you all lived in Albemarle County over five years? If you haven't raise your hand.

(All jurors indicated they have lived in Albemarle

County over five years.)

MR. CARTER: This case is going to involve a racial issue and I want to know from your own heart the truthful answer to this question. Does the fact that the people involved here are of different races, would that fact alone have an influence upon your decision in this case? If so, raise your hand.

(All jurors indicated in the negative.)

MR. CARTER: It's important now, that you be very...well, not only with the court and me but with yourself on this particular issue because you are talking about the kinds of things that make a lot of difference to our entire society. Do you feel that a person who sincerely believes that another person is a racist and says so, do you think that you can fairly and truly determine whether or not he should be punished for making a sincere statement like that? If you feel like that raise your hand?

(All jurors indicated in the affirmative.)

MR. CARTER: Do any of you belong to an organization such as NOW, National Organization for Women?

(All jurors indicated in the negative.)

MR. CARTER: Do any of you belong to the National Education Association, NEA?

(All jurors indicated in the negative.)

MR. CARTER: Are any of you members of labor unions?

MR. GLASS: Yes.

MR. CARTER: What labor union do you belong to?

MR. GLASS: Bricklayer's local union here in Charlottesville.

MR. CARTER: What's your name, sir?

MR. GLASS: Mr. Glass.

MR. CARTER: And how long have you been a member of that union?

MR. GLASS: 31 years.

MR. CARTER: Are there black members in your union?

MR. GLASS: Yes, sir.

MR. CARTER: How long have they been members of the union? Have they always been members of that union?

MR. GLASS: Yes.

MR. CARTER: Do any of you belong to any kind of organization that would be considered a neighborhood improvement organization?

MRS. HIRSCH: Yes.

MR. CARTER: Mrs. Hirsch?

MRS. HIRSCH: Yes, sir.

MR. CARTER: What organization do you belong to?

MRS. HIRSCH: Key West Cedar Hills Homeowner's Association.

MR. CARTER: Okay, what is its purpose?

MRS. HIRSCH: We are involved in community endeavors to improve roads and to lobby with local government officials for things we consider in the best interests of the subdivision.

MR. CARTER: Do you attend public meetings for that purpose?

MRS. HIRSCH: We usually appoint someone to attend any sort of...

MR. CARTER: Have you ever been appointed to attend?

MRS. HIRSCH: No.

MR. CARTER: How long have you been a member?

MRS. HIRSCH: I think about five years.

MR. CARTER: Any blacks in the organization?

MRS. HIRSCH: No, sir.

MR. CARTER: Any blacks in the neighborhood?

MRS. HIRSCH: Yes, sir. I may be incorrect about that. I'm not sure what the recent membership is. We do have a couple of black families in the neighborhood who are, of course, free to join.

MR. CARTER: I understand you also belong to a...

MR. BAKER: Yes, sir, the West Leigh Homeowner's Association.

MR. CARTER: And what's your name, sir?

MR. BAKER: Baker.

MR. CARTER: And what is the purpose of that organization? Is it the same as Mrs. Hirsch?

MR. BAKER: I think so except perhaps with one small difference that the property goes to the mid line of the road so we have to have an association to agree

on maintaining the road. We have no other function other than that really.

MR. CARTER: I see, so you are just concerned about roads?

MR. BAKER: Yes, sir.

MR. CARTER: Are you an officer in that organization?

MR. BAKER: Yes, sir.

MR. CARTER: What position do you hold?

MR. BAKER: I'm just one of the ones that gets elected. We have no specific functions.

MR. CARTER: Any blacks in the organization?

MR. BAKER: No.

MR. CARTER: Any blacks in the neighborhood?

MR. BAKER: Not that I know of.

MR. CARTER: All right, sir, what's your name?

MR. HARRISON. Harrison, I belong to Fry Springs Club.

MR. CARTER: Now is this a neighborhood improvement club?

MR. HARRISON: No, it's just a social club.

MR. CARTER: Any blacks in it?

MR. HARRISON: One.

MR. CARTER: And how long have you been a member?

MR. HARRISON: Thirty years.

MR. CARTER: And if the situation as I pointed out to you before becomes a racial issue, could you in your capacity as a member of an almost white organization render a fair and impartial verdict as far as the issues in this particular case are concerned?

MR. HARRISON: I could.

MR. CARTER: Have you all heard the term racist? — Have you all heard the term racism? If you do, tell me now or if you don't, tell me now, know the difference or is it necessary for me to explain it? Would you have any trouble dealing with the distinction between racism and racist? Think about it and be truthful with the court, with me and with yourself?

(All jurors indicated they knew the difference.)

MR. CARTER: There is a difference, you understand there is a difference, do you understand in your mind what that difference is?

(All jurors indicated in the affirmative.)

MR. CARTER: I hope and pray that all of you understand what I am getting at when you answer that you understand the difference.

(All jurors indicated in the affirmative.)

MR. CARTER: I have no further questions, Your Honor.

THE COURT: All right, you may pass the list to counsel for striking.

MR. CARTER: We'd like to get the panel identified.

THE COURT: All right, if there is a wish to have them identified, we will ask, starting with Mr. Harrison over here, give your name and then go straight down

the line.

(Panel members identified themselves.)

THE COURT: All right, you may pass the list to counsel for striking.

(List submitted to counsel for strikes.)

THE COURT: Ladies and gentlemen of the jury, the court says to you that the fact that you may be struck from the panel is in no way a reflection on your ability as a juror. Counsel are required to make a prerequisite number of strikes in each case.

THE CLERK: The following six people please stand aside as I call your names and have a seat in the courtroom: Shirley Chapman, George Cleveland, Purnell Eurbanks, Lester Greenwood, David Harrison, William J. Hicks.

THE COURT: All right, if you will identify the seven remaining.

THE CLERK: Answer as I call your name: Donald Baker, Dorothy Barkley, Fannie Clark, Cole Diggs, James Glass, Mimi Hirsch and James Howe.

THE COURT: All right, any objection to the jury panel as its presently constituted from the plaintiff?

MR. ALBRO: No objections, Your Honor.

THE COURT: From the defense?

MR. POINDEXTER: May we take up a matter, Your Honor, out of the presence of the jury panel?

THE COURT: All right, I will ask the jury to step into the jury room please.

(Jury retired to the jury room at this time.)

THE COURT: I will ask the members of the jury

who have been excluded from the panel to step into the hall please. Do not leave, just step into the hall briefly, those of you have been excluded from the panel.

(Rest of the jurors retired from the courtroom.)

MR. CARTER: If the court, please, I want the record of this trial to show that the three blacks that were on this jury, one of them disqualified himself and the other two were put off by the defendant and I want the record to show that and I want it to be very clear that the race issue in this case...he is entitled to have black people on that jury just like everybody else has and I resent the fact that they made a point, the first two were blacks, to put them off the jury and I want the record to show that's what happened and we except to it.

THE COURT: The record will so reflect. All right, you may bring in the jury.

MR. CARTER: I would move to quash the panel.

THE COURT: Motion overruled.

MR. CARTER: Thank you.

APPENDIX D

CIRCUIT COURT OF ALBEMARLE COUNTY, VIRGINIA

W. BEDFORD MOORE, III

Plaintiff

v.

JAMES N. FLEMING

Defendant

Law No. 976-L

October 21-22, 1982

Transcript Pages 45-47

Charlottesville Daily Progress
Editorial
January 26, 1975

RACISM AND THE RESERVOIR

Comes now JeRoyd X. Greene, Richmond's controversial black attorney, proclaiming that "neatly camouflaged racism" is the real reason behind the Albemarle supervisors hesitancy in giving the green light to a housing project near the South Fork Rivanna reservoir.

The reservoir, as Mr. Greene and his client well know, is already in serious trouble. Some 30,000 residents of Charlottesville and Albemarle - black and white - depend upon it for their water supply. That supply is now dangerously threatened by contaminants that are contributing to the rapid growth of marine life in the lake.

So grave is this problem, and so far-reaching are its implications for area citizens, that the city and county are considering jointly funding a major study to find, and hopefully to remedy, the causes of the reservoir's deterioration. That study should be authorized without delay.

The governing body of the county is therefore understandably and properly hesitant about permitting any

steps to be taken in the meantime which might further complicate an already serious situation.

One thing they do not need as they wrestle with the reservoir issue is having the highly irresponsible and utterly spurious charge of racism leveled at them.

The charge grows from the fact that Greene's client, the developer of the proposed $16 million reservoir project, is black. Disappointingly, the developer, Mr. James Fleming, has joined his attorney in the racism charge.

There are many aspects of our society as a whole and, indeed, that of our own area to which lingering racism contributes injustice and invidious discrimination. We join those who are genuinely concerned about human dignity and decency in roundly condemning them.

But the reservoir issue is not one of these.

If the developer and his attorney wished to demonstrate their concern for the black community, they would join the other citizens of the city and county who are urging that everything possible be done to protect and restore the reservoir so that all citizens, black and white, will be assured an adequate water supply.

Because if the efforts to save the reservoir fail,

the enormous cost of finding an alternative water supply will fall squarely and indiscriminately on the shoulders of all the taxpayers.

It may be that after an authoritative study of the matter, it will be found that the reservoir can be preserved without limiting such developments as that proposed by Mr. Fleming. If this can be done, we wish him well with his project.

But if it cannot, then no such developments or other potential polluters should be allowed.

At the moment, we simply do not know.

And until we find out precisely what is required to reverse the present deterioration of the water supply, and to protect it from further damage, no development should be permitted that might aggravate the situation.

And certainly the supervisors should not permit themselves to be swayed or stampeded into unwise actions by Mr. Greene's equally unwise and irresponsible charges.

Indeed, it might be correctly said that these charges, far more than the supervisor's well considered caution, are themselves examples of "neatly camouflaged racism."